IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2379 OF 2006

In

APPEAL (LODGING) NO.599 OF 2006

In

MISCELLANEOUS PETITION NO.1 OF 2005

WITH

APPEAL (LODGING) NO.599 OF 2006

In

MISCELLANEOUS PETITION NO.1 OF 2005

Mr.Aloysius Manuel D'souza
(brother of the deceased Mr.William
Manuel D'souza) & Ors. : Appellants

V/s.

Mrs.Mary Kamala William Manuel D'souza
& Ors. : Respondents

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Mr.Dilip Taur i/b. M/s.Kashar & Co., for the appellants.

Mr.A.K.Abhyankar i/b. Mr.R.D.Suryavanshi for respondent No.1.

Ms Sushma Joshi i/b. M/s.Haresh Mehta & Co., for respondent No.2.

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CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATE : AUGUST 22, 2006.

ORAL ORDER (R.M. Lodha, J.)

1. On March 3, 2005, the learned Testamentary Judge of this Court ordered issuance of heirship certificate of the deceased William Manual D'Souza in favour of Mary Kamala William D'Souza (respondent No.1). Aggrieved thereby, the present appellants have preferred this appeal.

2. Aloysius Manuel D'Souza - appellant No.1 is the brother of late William Manual D'Souza (hereinafter referred to as the "said deceased"). Denzil Alfred D'Souza - appellant No.2 is the son of one Ancey D'Souza (sister of the said deceased). Julious Machado - appellant No.3 is the husband of one Ethel D'Souza (sister of the deceased) and Clifford George D'Souza - appellant No.4 is the son of Hilda D'Souza (sister of the deceased).

3. The appellants have prayed for grant of leave to file the appeal and also for condonation of delay in filing the appeal.

4. Mary Kamala claims to be the widow of the said deceased. She applied for issuance of legal heirship certificate under Bombay Regulation VIII of 1827. Chapter

I thereof provides for Rules for the recognition of heirs, executors and administrators when there is a competent claimant while Chapter II provides for the appointment of an Administrator by the Zila Court when there is no heir or executor competent and willing to be placed in possession.

5. We are concerned with Chapter I. Clauses 1 to 8 thereof read thus:-

> "1. Whenever a person dies leaving property, whether moveable or immovable, the heir or executor, or legal administrator, may assume the management, or sue for the recovery, of the property, in conformity with the law or usage applicable to the disposal of the said property, without making any previous application to the Court to be formally recognized.
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> 2. First.--But if an heir, executor or administrator is desirous of having his right formally recognized by the Court, for the purpose of rendering it more safe for persons in possession of, or indebted to, the estate to acknowledge and deal with him, the Judge, on application, shall issue a proclamation, in the form contained in Appendix A, inviting all persons who dispute the right of the applicant to appear in the Court within one month from the date of the proclamation and enter their objections, and declaring that, if no sufficient objection is offered, the Judge will proceed to receive proof of the right of the applicant, and, if satisfied, grant him a certificate of heirship, executorship or administratorship.
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> Second.--[Publication of proclamation] Rep. Act. XII of 1873.
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> 3. If, at the expiration of the time mentioned in the proclamation, no sufficient

objection has been made, the Court shall forthwith receive such proof as may be offered of the right of the person making the claim, and, if satisfied, shall grant a certificate in the form contained in Appendix B, declaring him the recognized heir, executor or administrator of the deceased.

4. First.--If, before the expiration of the time, any objection is made to the right of the person claiming as heir, executor or administrator, the Judge, on a day to be fixed (of which at least eight days' previous notice shall be given to the parties), shall summarily investigate the grounds of the objections on the one hand, and of the right claimed on the other, examining such witnesses or other evidence as may be adduced by the parties, and either grant or refuse a certificate, as the circumstances of the case may require.

Second.--But if from the evidence adduced, it appears that the question at issue between the parties is of a complicated or difficult nature, the Judge may suspend proceedings in the application for a certificate until the question has been tried by a regular suit instituted by one of the parties.

5. Whenever an executor is formally recognised, under the rule contained in section 4, the authenticity of the will, if any, by which he is appointed, shall be proved, and the certificate of executorship shall be endorsed thereon.

6. [Wills and recognitions to be registered.] Rep. Act XII of 1873.

7. First.--An heir, executor or administrator, holding the proper certificate, may do all acts and grant all deeds competent to a legal heir, executor or administrator, and may sue and obtain judgement in any Court in that capacity.

Second.--But, as the certificate confers no right to the property, but only indicates the person who, for the time being, is in the legal management thereof, the granting of such certificate shall not finally determine

> nor injure the rights of any person; and the certificate shall be annulled by the Zila Court, upon proof that another person has a preferable right.
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> Third.--An heir, executor or administrator, holding a certificate, shall be accountable for his acts done in that capacity to all persons having an interest in the property, in the same manner as if no certificate had been granted.
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> 8. The refusal of a certificate by the Judge shall not finally determine the rights of the person whose application is refused, but it shall still be competent to him to institute a suit for the purpose of establishing his claim."

6. The first part of clause 7 provides that an heir holding the proper certificate, may do all acts and grant all deeds competent to a legal heir and obtain judgement in any Court in that capacity. The second part of clause 7 clarifies that the heirship certificate confers no right to the property. It only indicates the person who is in the legal management of the property of the deceased. It further provides that grant of such certificate does not finally determine nor injure the rights of any person and the certificate may be annulled by the Zila Court upon proof that another person has a preferable right. The third part of clause 7 provides, inter alia, that a heir holding a certificate shall be accountable for his acts in that capacity to all persons having an interest in the property, in the same manner as if no certificate had been granted.

7. Clause 8 provides that refusal of a certificate by the Judge shall not finally determine the rights of the person whose application is refused, but shall still be competent to him to institute a suit for the purpose of establishing his claim. Conversely, therefore, it can be said that if the certificate is granted, then it does not finally determine the rights of the person in whose favour the certificate has been granted and does not take away the rights of other person to establish his claim in the competent Court nor does, as provided in the second part of clause 7, the certificate confer any right to the property.

8. The appellants seek to submit that Mary Kamala never married the said deceased and she is not his widow and, therefore, not entitled to the estate of the deceased.

9. The grant of heirship certificate does not establish the right of such party in the property of the deceased by itself. In this view of the matter, the rights of the appellants, if any, in the property of the deceased are not taken away by grant of heirship certificate to the respondent No.1. On the other hand, clause 7 further makes it clear that such heirship certificate holder is accountable to all persons having an interest in the

property for the acts so done by him or her.

10. In the backdrop of the aforesaid legal position, it needs no emphasis that based on the heirship certificate simplicitor, the respondent No.1 cannot be said to have acquired any right or title in the estate of the deceased.

11. The respondent No.1 has filed an affidavit dated 19.8.2006 before us stating therein that she has been residing at flat No.2-C, 2nd floor, IL Palazzo Co-operative Housing Society Ltd., Little Gibs Road, Malabar Hill, Mumbai, and that she has not created any third party rights in respect of the said flat. She has further undertaken that for a period upto 18.11.2006, she will not apply to IL Palazzo Co-operative Housing Society Ltd. for transfer of Share Certificate in her name in respect of the said flat on the basis of the legal heirship certificate. An affidavit has also been filed by the Constituted Attorney of the respondent no.1 on 19.8.2006 stating therein that he has not created any third party rights in respect of the said flat and that no application shall be made by him to the society for transfer of the Share Certificate in the name of respondent No.1 in respect of the said flat upto 18.11.2006 and that until that date, as a Constituted

Attorney, he shall not sell, transfer, mortgage, alienate or create any third party rights in respect of the said flat.

12. We are, thus, of the view that the appellants need to prosecute their remedy for determination of their rights in the estate/properties of the said deceased by pursuing appropriate legal remedy. In the circumstances and the legal position noticed above, we do not deem it necessary to grant leave to the appellants to challenge the order of heirship certificate granted in favour of the respondent No.1 even if we assume that the delay in filing the appeal is sufficiently explained. The appellants as well as the respondent No.1 have an adequate remedy of establishing their rights in the estate of the deceased in the appropriate proceedings.

The appeal as well as the Notice of Motion are disposed of accordingly.

Sd/-

R.M. LODHA, J.

Sd/-

S.A. BOBDE, J.